

EXHIBIT 5

Westlaw.

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(Cite as: Not Reported in F.Supp.)

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United States Court of International Trade.
THE FLORSHEIM SHOE COMPANY, DIVISION
OF INTERCO, INC., PLAINTIFF.

v.

UNITED STATES, DEFENDANT.

No. 82-4-00484.

January 7, 1983.

*1 Baker & McKenzie (William D. Outman, II and
Munford Page Hall, II, Esqs., of counsel) for the
plaintiff.

J. Paul McGrath, Assistant Attorney General (Joseph
I. Liebman, Attorney in Charge, International Trade
Field Office, Commercial Litigation Branch, and
Michael P. Maxwell, Esq.) for the defendant.

*2 NEWMAN, Judge:

My recent order of December 30, 1982 summarized
the background of defendant's pending motion and
plaintiff's cross-motion for extensions of time arising
out of defendant's motion to dismiss and plaintiff's
discovery request. See 4 CIT 275 (1982). Further,
that order observed that it was unclear from plaintiff's
papers whether there are issues of fact concerning the
grounds asserted in defendant's motion to dismiss.^{FN1}
More, the order pointed out that "if defendant's
motion to dismiss solely raises questions of law, then
discovery of factual matter is unnecessary." For the
purpose of clarifying plaintiff's need for discovery
and resolving the question of "who goes first," an
informal discovery conference was held in chambers
on January 5, 1983, as scheduled in the order.

^{FN1}. To reiterate, the grounds asserted in
defendant's motion to dismiss are: plaintiff's
lack of standing, the complaint's failure to
state a claim, and the scope of review for the
Presidential action complained of.

At the conference, counsel for plaintiff was accorded
a full opportunity to clarify plaintiff's legal theories
relative to the threshold issues raised by the
Government's motion to dismiss, and plaintiff's
predicate for asserting the existence of "questions of
law and fact which must be resolved before the Court
can decide whether to dismiss the present action". In

that connection, plaintiff's counsel presented oral
argument and submitted to the Court an outline
summarizing the procedural history of this litigation,
the three grounds relied upon by defendant in its
motion to dismiss, and the "[r]easons plaintiff
requires discovery to respond to defendant's motion
to dismiss". Plaintiff's outline limited the initial
broad-scale discovery request to specific
interrogatories claimed to be relevant to two of the
three grounds for dismissal urged by defendant.^{FN2}

^{FN2}. Plaintiff concedes that on the question
of lack of standing there are no factual
issues. In fairness to plaintiff, it should be
noted that plaintiff served its request for
discovery prior to defendant's service of a
motion to dismiss the action.

At the conference, defendant adhered to its position
that its motion to dismiss rests on questions of law,
and conceded that as to any factual matters, the
allegations in the complaint must be deemed to be
true for purposes of the motion to dismiss.

After due consideration of the memoranda filed in
support of the pending cross-motions and the oral
presentations of counsel at the conference,^{FN3} I have
concluded that the grounds asserted in defendant's
motion to dismiss, essentially, raise questions of law.

^{FN3}. The Court desires to express
appreciation to counsel for both parties
appearing at the conference for their helpful
clarification of their respective positions.

As previously noted, plaintiff concedes that on the
question of standing there are no factual issues; and
as to whether the complaint states a cognizable claim,
defendant concedes that all allegations must be
deemed to be true for purposes of the motion to
dismiss. The third question raised by defendant--the
Court's scope of review in this case--plainly is a
matter of law. Obviously, then, if this action is
dismissed on the basis of any of the three grounds
urged by defendant, plaintiff's proposed discovery
will be unnecessary. Under all the circumstances, I
see no prejudice to plaintiff in *3 deferring its
discovery until after defendant's motion to dismiss is
adjudicated.

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Accordingly, it is hereby

Ordered that defendant's motion for an extension of time be, and hereby is, granted; plaintiff's cross-motion for an extension of time is denied; and it is further

Ordered that defendant's time to respond to plaintiff's interrogatories and request for production herein be, and hereby is, stayed and extended to and including thirty (30) days from the entry of an order adjudicating defendant's pending motion to dismiss in this action; and it is further

Ordered that plaintiff shall respond to defendant's motion to dismiss this action within thirty (30) days of the entry of this order.

Floresheim Shoe Co. v. U.S.

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